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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Rules and Regulations Implementing)
the Telephone Consumer Protection)
Act of 1991)

CC Docket No. 92-90

ORIGINAL
FILE

PETITION FOR CLARIFICATION OR RECONSIDERATION

U S WEST Communications, Inc. ("USWC"), through counsel and pursuant to the Federal Communications Commission's ("Commission" or "FCC") Rule 1.429,¹ hereby petitions for clarification or reconsideration of two aspects of the Commission's Report and Order ("TCPA Order"),² in the above-captioned docket.

The subject matters of this Petition are: (1) a transport/network/broadcast provider's liability for compliance with the Telephone Consumer Protection Act of 1991 ("TCPA"), and the Commission's implementing rules and regulations,³ when the provider is not the originator or controller of the content of the call or message; and (2) the need for an intermediate transport/network/broadcast provider to "re-identify" itself to a recipient of a facsimile message, when the provider did not originate or control the content of the message.

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¹47 C.F.R. § 1.429.

²Report and Order, FCC 92-443, rel. Oct. 16, 1992.

³47 C.F.R. §§ 64.1200, 68.318(c).

I. TRANSPORT PROVIDER LIABILITY

At two places in the Commission's TCPA Order, the Commission discusses the liability of a "carrier" for the messages/transmissions authored by another.⁴ The Commission should clarify that its holding was not restricted to "carriers," as that term has historically been defined by the FCC and understood by those in the telecommunications industry. Rather, the Commission should make clear that its finding was meant to encompass "service providers that merely transmit the message to its destination and do not determine content or distribution."⁵ We believe that such an articulation actually comports with what the Commission meant to convey when it agreed with certain commentors raising the issue of such service provider liability.⁶

The matter of service provider liability for messages held unlawful under the TCPA, or the Commission's correspondent rules, was raised by a number of filing parties, both with regard to facsimile broadcast services and voice messaging services. Few of those commenting parties posed the issue as one involving "carrier's" liability,⁷ and only one -- Pacific Bell -- mentioned

⁴See TCPA Order at n.83 and ¶ 54.

⁵In reply, this was how the American Telephone and Telegraph Company ("AT&T") suggested the matter should be phrased. Reply Comments of AT&T, filed herein June 25, 1992, at 9.

⁶See TCPA Order at ¶ 54, wherein the Commission stated, "[w]e concur with these commenters."

⁷See, e.g., Comments of Bell Atlantic Telephone Companies ("Bell Atlantic"), filed herein May 26, 1992, at 3-4 (where it
(continued...)

"common carrier."⁸

In addition to Bell Atlantic and Pacific Bell, other parties commenting on this issue were: Southern New England Telephone Company ("SNET"), Sprint Corporation ("Sprint") and (in reply) AT&T. SNET talked about a transport provider's liability in the context of an "unregulated activity" involving facsimile transmissions;⁹ Sprint discussed the matter in the context of facsimile broadcast service providers and enhanced services;¹⁰ Bell Atlantic discussed the concept within the confines of voice messaging services and with regard to a "carrier or other person who simply provides the transport or storage of the message;"¹¹ Pacific Bell discussed certain liability issues with regard to "intermediary message handlers";¹² and AT&T discussed the matter

⁷(...continued)
argues that, under the TCPA, neither a "carrier or other person" should be liable for mere transmission or storage of unlawful messages). Compare Comments of Pacific Bell and Nevada Bell ("Pacific" or "Pacific Bell"), filed herein May 26, 1992 at 5.

While the Commission stated that the commenting parties urged it "to clarify that carriers who simply provide transmission facilities that are used to transmit others' unsolicited facsimile advertisements may not be held liable for any violations of § 64.1200(a)(3)[,]" (TCPA Order at ¶ 54 (emphasis added)), a perusal of the comments demonstrates that the request went beyond a declaration regarding carriers or carrier services.

⁸Comments of Pacific at 6.

⁹Comments of SNET, filed herein May 26, 1992, at 8.

¹⁰Comments of Sprint, filed herein May 26, 1992, at 10-11.

¹¹Comments of Bell Atlantic at 3-4.

¹²Comments of Pacific at 6.

within the context of "service providers that merely transmit the message to its destination and do not determine content or distribution."¹³

In response to these commentors, in two separate places in the TCPA Order, the FCC mentions the non-liability of "carriers" with regard to the "content of messages transmitted through the network."¹⁴ The first reference is to voice messaging services; the second to the underlying distributors of facsimile messages.

With regard to the voice messaging discussion, the Commission indicates that the caller (meaning the party originating the content or the "author") is responsible for ensuring compliance with the TCPA and the Commission's rules, not

¹³Reply Comments of AT&T at 9.

¹⁴TCPA Order at n.83 (voice messaging) and ¶ 54 (facsimile services). Footnote 83 quotes from Senator Hollings' remarks, cited above. See n.4 supra. Those remarks, in full, read as follows:

Finally, I want to clarify how this bill applies to carriers who might unknowingly transmit calls made in violation of this bill. It is not our intention that a carrier should be held liable for transmitting over the carrier's network any call or message in violation of this legislation made by an entity other than the carrier. This intention is consistent with our policy that carriers should not be responsible for the content of messages delivered over their networks. If carriers were held responsible for such transmissions, they might be forced to monitor telephone conversations, which would not be in the public interest. To the extent carriers are responsible for initiating or placing telephone calls or messages, however, they must comply with the terms of the bill.

178 Cong. Rec. S18785 (Nov. 27, 1991).

Senator Hollings' remarks on the floor were not as generic as those reflected in the Senate Report discussed below at note 17.

the voice messaging service provider. The Commission cites to certain remarks of Senator Hollings in the Congressional Record, wherein the Senator discusses "carrier" liability under the TCPA.¹⁵ Likewise, the Commission's footnote references "the carriers providing the services[.]"¹⁶

We believe that the use of the word "carriers" by the Commission was probably inadvertent, since the context of the discussion involved enhanced services, services not offered by telephone companies -- or others -- in a "carrier" capacity. Indeed, there is legislative history support for the proposition that Congress did not intend for service providers generally -- not just carriers -- to be held responsible for compliance or noncompliance with the Communications Act.¹⁷

Thus, U S WEST requests that the Commission make clear that -- in conformity with the legislative history of the TCPA -- a

¹⁵See TCPA Order at n.83. See the full text of Senator Hollings' remarks at n.14 supra. In addition to these comments of Senator Hollings, similar remarks can be found in Senate Report 178 ("The telephone companies usually do not know when their lines are being used for telemarketing purposes, and, even if they did, it is questionable whether the telephone companies should be given the responsibility of preventing such calls by monitoring conversations."). S. Rep. No. 178, 102nd Cong. 1 Sess. (1991), 1-2. See also S. Rep. No. 177, 102nd Cong., 1 Sess. (1991), at 2 to the same effect.

¹⁶TCPA Order at n.83.

¹⁷In Senate Report 178 it is stated, "[t]he regulations concerning the use of these machines apply to the persons initiating the telephone call or sending the message and do not apply to the common carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message." S. Rep. No. 178, 102nd Cong., 1 Sess. (1991), at 9 (emphasis added).

voice messaging provider is not responsible for its participation in delivering (or later "making a call" through a broadcast mode, for example) a prerecorded or artificial voice message that does not comply with the TCPA or the Commission's rules.¹⁸

The Commission should provide the same kind of clarification with regard to facsimile platform/broadcast providers. The parties commenting on facsimile services during the course of the proceedings did not generally describe their activities as carrier activities; nor did they request a clarification of liability with regard to carrier services. They described enhanced services.

Given the fact that the Commission generally "concurred" with the positions of the filing parties,¹⁹ it should clarify that its concurrence goes beyond "carrier liability" to "service provider liability." It is clear that Congress did not intend for such intermediate transmission entities to be liable under the TCPA. Thus, acting in its expert agency capacity, the Commission should make this clear; and make clear that such service providers have no liability under the Commission's rules

¹⁸Such non-compliance calls might include a commercial call sent to a residential line by a business with whom the resident has no prior business relations, which is "broadcast" by the voice messaging service provider; or a call to an emergency line or health facility without the prior express consent of the entity.

¹⁹See TCPA Order at ¶ 54.

either.²⁰

II. REQUIRED IDENTIFICATIONS FOR FACSIMILE TRANSMISSIONS

The purpose of the facsimile identification portion of the TCPA was to prevent the sending of "junk faxes," with attendant cost and "down time," to unreceptive recipients. This purpose can clearly be satisfied by requiring only that the author of the message identify its business and sending telephone number. In this way, if the author of the message sends a prohibited message, e.g., an unsolicited advertisement, the recipient has knowledge of whom to contact or complain to. There is no need for the intermediate facsimile broadcast provider to "re-identify" the authoring party or itself.

The Commission should clarify that under Section 227(d)(1)(B) of the TCPA, and its proposed Rule 68.318(c), the

²⁰The legislative history can be read to reflect a position of "no liability" at all. But for Senator Hollings' singular reference to "unknowing" transmissions in his remarks quoted at n.14 supra, the legislative history generally demonstrates a focus on telemarketers and manufacturers. Telemarketers are required to do certain things and refrain from doing other things; manufacturers are required to manufacture equipment in conformity with certain standards.

In the Commission's analysis of this matter, however, it framed a certain standard of "carrier" liability. See TCPA Order at ¶ 54. We would urge the Commission to reconsider its remarks about "carrier" liability, as well. The better course, we believe, is to find that under this legislation Congress intended no liability for intermediate transport providers.

If the Commission does not find such an interpretation satisfactory, then we urge it to adopt the same liability standard for service providers under the TCPA and the Commission's corresponding rules as it previously pronounced for carriers.

"identification" that occurs (i.e., the date/time identification, as well as the identification of the business or other entity "sending" the facsimile message) is the author of the message content and not an intermediate facsimile transport/broadcast provider.²¹ In light of the legislative history discussed above, the Commission should make clear that the transport/broadcast provider -- who exerts no control over the origination of the message content -- has no compliance obligations.

III. CONCLUSION

On the basis of the above, USWC requests that the Commission declare that transport providers who carry facsimile or voice messages deemed unlawful under the TCPA, have no or limited liability for such transmissions. Furthermore, we request that the Commission clarify that only the author of an

²¹Bell Atlantic has asked for such a ruling in its initial comments. See Comments of Bell Atlantic at 4.

originating facsimile message need comply with the identification requirements found in Section 227(d) and the Commission's proposed Rule 68.318(c).

Respectfully submitted,

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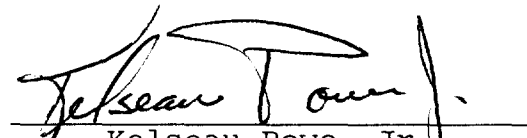
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November 23, 1992

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify on this 23rd day of November, 1992, that I have caused a copy of the foregoing **PETITION FOR CLARIFICATION OR RECONSIDERATION** to be served, via first class United States mail, postage prepaid, to the persons named on the attached service list.


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